IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6521 OF 2006

Suresh Ramchandra Jadhav ..Petitioner

Vs.

No One ..Respondents

Mr.S.M.Kamble for the petitioner

CORAM : A.P.DESHPANDE, J

DATED : 1ST DECEMBER, 2006

P.C.:

1. Rejection of an application moved by the petitioner before the District Judge, Raigad, Alibag by an order dt.29.6.06 has given rise to the filing of the present petition. The Misc.Application no.36/04 was filed by the present petitioner u.s.276 of the Indian Succession Act with a view to obtain a probate of the will executed by the paternal aunty of the petitioner which is dt.5.9.00. The testator, Smt.Bhagubai Shripati Ahire expired on 11.12.00.

2. The learned counsel for the petitioner

submits that Testator died issueless and her husband had expired long before her death. According to the petitioner, there were no near relations of the testator and as the petitioner was looking after her, she had made a bequeath in favour of the petitioner by executing a will and with a view to obtain a probate of the will, the said Mis.Application was filed.

3. The application came to be dismissed on 16.6.05 as the petitioner remained absent and no one was present when the matter was called out. Thereafter on 6.2.06, the petitioner made two applications, one for condonation of delay and another for restoration. In the first instance, the application for restoration was rejected by the trial court as it was of the opinion that there is no provision in C.P.C. under which the court could restore the matter, when it relates to probate proceedings. Aggrieved by the said order, the petitioner filed a writ petition in this court bearing no.2346/06. The learned single Judge of this court allowed the writ petition by an order dt.7.4.06 and remanded the matter back to the

District Judge to decide the applications for condonation of delay and restoration, on merit. The Dist. Judge has rejected the application for condonation of delay by recording a finding that the delay of 6 months has not been satisfactorily explained by the petitioner.

4. The learned counsel for the petitioner submits that if the proceedings initiated for obtaining probate are permitted to be rendered nugatory by refusing to condone the delay, the petitioner will be put to suffer irreparable loss and undue hardship and inconvenience would be caused to him. He points out that there are no near relations of the deceased testator and hence, there is no question of impleading any one as party respondent. No one was opposing probate proceeding before the trial court despite a public notice being issued at Manmad and Raigad. Notice at Manmad was directed to be published as the testator's husband hails from that place whereas notice at Raigad was issued as the testator' last resided at Raigad alongwith the [present petitioner.

5. The learned counsel for the petitioner in all fairness then submits that if this court is permitting the petitioner to participate in the proceeding by condoning the delay and granting restoration of the probate application then interest of a person who might be interested, could be taken care of by directing fresh publication of notice in the newspaper at the above referred two places. The learned counsel further volunteers that on account of failure on the part of the petitioner to be diligent, the petitioner could be saddled with some costs.

6. Having regard to the totality of facts and circumstances, the impugned order passed by the Dist. Judge deserves to be quashed and set aside, as no purpose would be served by dismissal of the probate application in default, as that would unnecessarily leave a cloud of doubt over the title of the property involved in the will. In the result, impugned order is quashed and set aside. Writ Petition is allowed. Delay is condoned and Misc.Civil Application No.36 of 2004 is restored to

file. However, this order is subject to payment of cost of Rs.5000 by the petitioner to the District Legal Services Committee. The cost to be deposited within a period of 2 weeks. It is made clear that after restoration of the Mist.Application, the Dist Judge shall direct fresh public notice to be issued in the local daily having vide circulation at Manmad and at Raigad and thereafter proceed to decide the application in accordance with law. Rule made absolute in above terms.

(SHRI A.P.DESHPANDE, J)